There are other intangible assets associated with a business other than those that are directly accounted for on the books of a company. There are costs involved in forming an effective workforce and an effective business in general. These costs may be difficult to estimate, but they do exist and they do have significant value. Indeed, intangible assets have value, although that value is rarely stated formally on the books and records of a company. The value of a business in the cable television industry has more to do with a viable subscriber base, and other intangible assets than the sum of the value of its physical assets. Moreover, MSOs acquiring smaller systems can realize efficiencies and economies of scale and can recognize the opportunity for synergistic acquisitions that will ultimately benefit subscribers by consolidation management, program acquisition and customer service within a more ret to
be provided unknown video services. For example, it is well known that one of the more heavily advertised high powered DBS services, "DirectTV," is actually set up to provide exclusive distributorships such that a consumer at any particular location will only be able to buy the service from one distributor. These

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43/ To the extent that MSOs have been acquiring smaller systems for these reasons and achieving economies it would be anomalous to disallow "excess" acquisition costs when incurring these costs ultimately benefits subscribers.

distributors are paying the DBS licensee and the exclusive marketing arm, National Rural Telecommunications Cooperative, fees of $30 to $35 per residence along with other charges, although the programming lineup, equipment and operations are not yet finalized.[44/] Interestingly, DirectTV will be exempt from rate regulation, program access, customer service and the other requirements that are being imposed on cable operators. Yet, by these calculations, a DirectTV distributor seeking to serve a small community of 60,000 homes would be required to make a minimum payment up front of more than $2 million before one dollar of revenue is earned, the services yet to be defined, and the satellite to provide service not yet launched.

E. Ratebase Valuations Including Intangibles Are Reasonable

1. Purchase Decisions Did Not Produce Monopoly Rents

The proper valuation of cable has been unnecessarily confused with the acquisition prices paid for cable systems in the 1980s. There are certainly examples of cable purchasers who paid too much. Similarly, there are some operators who purchased properties and raised rates without improving service, merely to cover the cost of debt service. But those anecdotes cannot

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44/ Details of DirectTV's marketing plans, in conjunction with the NRTC, were detailed in an article last July in Satellite Business News, July, 1992.

substitute for reasoned examination of the actual efficiencies and innovations deployed by cable operators who have purchased cable systems at responsible prices and turned them to the benefit of the public.

These experiences fundamentally disprove the Commission's startling assumption that a purchase price above book value cannot reflect unrealized economies because no "monopolist" would introduce such efficiencies after acquisition. Indeed, the entire post-1984 record of the cable industry, from expansions of channel capacity to introduction of new programming, addressability, and fiber belies the Commission's assumptions.

Moreover, the business decisions in a competitive market justify the recognition of value in excess of tangible assets. When an acquisition of any business is considered, many variables are evaluated in order to determine the fair market value of that business. Fundamentally, the operations of the business are assessed to determine if cost savings and efficiencies can be achieved or if technological improvements can be made. Expectations for product changes and improvements are considered in order to determine if increases in sales can be projected. Product prices are studied to determine whether margins can be increased through higher unit prices. Consideration must also be given to seller's requirements, i.e., at what price will the transaction be viable? These variables are studied,

likely scenarios are defined and the inputs and assumptions are evaluated to determine the optimal purchase price.

In the case of a cable system purchase, assumptions of a few primary factors will impact purchase price: rate increases, subscriber penetration increases, and ability to enhance service. These changes will potentially increase revenues and thus increase system profitability. A review of any of the acquisition model documentation for purchases consummated in the last ten years likely would reflect similar expectations on the buyer's part. Although we cannot include this confidential information in our comments, it would be available to the Commission during a rate proceeding in order to evaluate the reasonable basis for the acquisition premium paid at the time of purchase. The following example, though not of an actual purchase, is representative of many deals made in this time frame.

Suppose a system is purchased at a price of $2,100 per subscriber which includes a premium above book value of some $750 million dollars. This new operator may well expect to operate at a loss for the first few years, when at the end of this start-up period, penetration, pay subscribership and basic and pay revenue increases will adequately offset debt service, resulting in positive net income. The typical assumptions which might be made at the time of the acquisition are as follows:

Assumption	Projected CAGR for first five years[45]
Basic Penetration	5%
Basic Rates per Subscriber	8%
Pay TV Subscribers	7%
Pay per View Revenues	25%
System Expenses	8%
GNP Inflation	4%

These assumptions show that even though rates are projected to increase somewhat faster than the projected rate of inflation during the period, they are in keeping with the rate of growth of system expenses. It is also evident that the premium paid above book value was not to be solely recovered through increased rates; basic penetration and pay television subscribership also would significantly contribute.

For a recent acquisition, these results probably have not been achieved by the time that the operator finds itself in a rate regulated environment. In fact, the benchmarks themselves will only further delay the system profitability as revenues will be eroded and costs will not be fully recovered.

The following reflects the results achieved to date for this hypothetical system:

45/ Compound annual growth rate.

Assumption	Actual CAGR
Basic Penetration	1%
Basic Rates per Subscriber	5%
Pay TV Subscribers	.5%
Pay per View Revenues	20%
System Expenses	12%

Accordingly, this operator did not make up the "excess" through increased rates; indeed it only raised prices 5% versus the 8% projected at the time of purchase. And with lesser increases for the other elements, the cable operator faces even more uncertainty if its prices must now be further reduced uneconomically. The prices paid for all cable systems by all cable purchasers in the 1980s obviously cannot all be justified as unrealized economies; but neither can they be dismissed out of hand as trafficking in monopoly profits.

The traditional rule disallowing utilities an acquisition premium may make sense for utilities long subject to rate base rate of return regulation. With that rule, sellers and buyers have a common interest: if buyers pay an inflated purchase price, the amount would still be recoverable from ratepayers when included in the ratebase, while the seller realizes a value above that reflected on its books which could not previously be reflected in rates. The sale could, therefore, reward the seller and allow the buyer to increase rates to fully capture this premium. "The acquisition of the property of one utility by another utility presents the possibility for abuse, or

at least confuses the question of the proper value to be placed on such property for ratemaking."[46/] In the remand decision, the Commission had allowed premiums to be included in the ratebase when the plant was acquired "without traffic." Id. In situations where plant is acquired with traffic the Commission requires justification for inclusion of the premium.

The 1980's cable acquisitions which received the greatest attention from Congress during the consideration of the 1992 Cable Act took place in markets where no such collusive pricing was possible. No buyers had an unlimited credit line with which to inflate ratebases: purchasers sought the lowest possible price, and had interests quite adverse to sellers. Those same buyers knew that they were delivering services for which there were reasonable substitutes, and to which (at the time) most people did not subscribe. There is no evidence that the transactions were at anything other than a fair, arms length price. Buyers and sellers both had fiduciary obligations to

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46/ Illinois Bell Tel. Co. v. FCC, 911 F.2d 776, 784 (D.C. Cir. 1990) (quoting In Re Amendment of Parts 65, 4 F.C.C.Rcd. 1697, 1704 (on reconsideration) (1989)). However, even in the regulated utility situation, when an asset is acquired from a non-affiliated carrier, the acquisition premiums may be included "when the price of an asset is determined by an arm's length transaction in the normal course of business, we believe there is reasonable assurance that the price paid would not be manipulated to the detriment of ratepayers. We see no incentive for a carrier to inflate the ratebase in such situations." In the Matter of Amendment of Part 65, 7 F.C.C.Rcd. 296, 299 (1991) (on remand).

their shareholders and investors. Indeed, most of the prices in the 1980s were based upon third party appraisals after careful "due diligence" analyses of the systems being acquired. Nothing in the record suggests that the prices were conspiratorially inflated to defeat regulatory discipline, in the manner of electric utilities before regulation. Thus, there was no motive to artificially inflate rate base, and no basis for retroactively applying a rule intended as a prophylactic against such artifice.

Investors in the 1980's looked to cable systems much as the FCC had encouraged them to: as systems with ample room for expansion, growth, and development into a nationwide broadband communications network. Investment in cable was rational and, as it turned out, quite properly predicted the future development of cable. Penetration nationwide has increased, service offerings expanded and programming choices multiplied.[47/] These realized expectations -- not the expectation of any monopoly profits -- made cable quite an attractive investment in the 1980's and, consistent with other types of merger activities.

47/ In the last decade, penetration nationwide has increased from 43% to over 60%, channel capacity expanded such that now 2/3 of all systems serving 94% of all cable subscribers have more than 30 channels (a full 1/3 of all subscribers now receive more than 54 channels) and more than 40 new programming services have been launched. NCTA, "Cable Television Developments" (March 1993).

Nor is there any suggestion in the record that the assets purchased are not fully used and useful in delivering regulated cable services to the public. In short, much of the prices paid in the 1980s were reasonable, and reflect the real -- but not yet fully recognized -- economic value of cable firms.

As an example, we attach a statement pertaining to Rifkin Acquisition Partners, L.P. (Exhibit B). Rifkin, primarily financed by debt, has managed to grow, maintain financial health, add subscribers and upgrade its systems. Although it has generated earnings before interest, taxes, depreciation and amortization, it has never recorded a profit and not paid any funds to its equity investors. The benchmark rate rollbacks will, however, force it into default by reducing cashflow to the extent that protection of the courts may be the only remedy. This is clearly not the proper regulatory policy to be implemented in a new rate regulation regime.

Similarly, KBLCOM, while again financially healthy, shows negative retained earnings (Exhibit A). Growth, reinvestment and increased subscriber penetration have still been achieved in the relevant time frame. Yet the premise that acquisition premiums in the 1980s allowed monopolists to extract profits by imposing exorbitant rates, would not be consistent with the financial statements for both Rifkin and KBLCOM. Negative retained earnings and lack of payments to equity investors

markedly demonstrate the fallacy of the "monopolist" assumption with respect to acquisition premiums.

2. General Accounting Principles Support Establishing "Goodwill" Accounting Entries

Cable operators -- like many unregulated companies -- have routinely expensed start-up costs resulting in operating losses incurred in early years of an investment cycle. Subscribers have benefited and continue to benefit from low rates resulting in start-up losses and foregone earnings. A regulated firm would have capitalized those early start-up costs and recovered them in later years. The fact that cable's accounting has not yet created that regulatory asset does not mean that those amounts do not produce economic value, though it may only be reflected in "goodwill" or "other intangibles."

The fundamental value of cable firms should not depend upon the accounting classification of assets as goodwill or other intangibles, when the records were generated under fundamentally different assumptions, and may not themselves represent the full underlying economic value of the firm. At the same time, the valuation standard should be one that can be implemented using existing or readily replicable firm data. For example, the Supreme Court recognized that, for tax accounting purposes, intangibles such as subscriber lists were shown to be subject to amortization although included as "goodwill." Newark Morning

Ledger v. United States, 507 U.S. ___, ___; 123 L.Ed.2d 288, 304-07 (1993).

The Commission has also recognized some of the limitations of existing records, such as the mismatch between accumulated depreciation shown on the books and an "original cost" valuation of gross assets.[48/] But the limitations are far more profound than that example would suggest. Numerous business combinations have occurred over the years and generally accepted accounted principles require accounting for those transactions in a manner inconsistent with original cost valuation. APB-16 (pertaining to business combinations) makes original cost valuation unreasonable and impractical for cable operators. APB-16, ¶67 (subparts (a) and (c)) provide that assets acquired by exchanging cash or other assets are recorded at "cost," defined as the amount of cash disbursed for the fair value of the other assets distributed or, if acquired for shares of stock, the asset is recorded at the fair value of the shares.

Moreover, ¶87 of APB-16 provides that all identifiable assets acquired in a business combination shall be assigned a portion of the cost of the acquired company, normally equal to their fair value at the date of acquisition. These principles illustrate the difficulty in applying "original cost" of the

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48/ NPRM ¶ 26.

first person to dedicate property to public use in the regulation of cable operators. Proper accounting for cable acquisitions requires a restatement of the books to the fair value cost of the system at the time of purchase according to GAAP.

As a consequence, "original cost" valuation (as the Commission has construed it) is simply impractical for most systems which have changed ownership. Buyers typically followed GAAP in accounting for acquired systems, and therefore did not maintain records of the seller's costs. Systems now in existence bear no resemblance in most situations to original systems. Improvements and purchases made over many years would make it tedious and unreasonable to trace costs back to their "origin."49/

In order to maintain consistent treatment among systems that are purchased, and assets written-up, and those which are held and built, there is a need to assign a "fair value" to the property as arguably the 1992 Cable Act is the time that a cable operator's property is being first devoted to public use. Because systems have been bought and sold far more often than

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49/ A brief review of KBLCOM's system histories (Exhibit A) demonstrate the impossibility of ever uncovering documents pertaining to the establishment of the system -- let alone determining "original cost." And this problem is not unique to KBLCOM; by AUS's estimates, less than 10% of the existing cable systems in the U.S. are still held by the original owners. AUS Report at 25.

with other regulated utilities, it would be much easier to assign fair values to the systems, which, given the unique nature of the cable industry to date, reflect not only the cost of establishing the systems, but the expected investment returns growing out of the capital commitment over the years.[50/]

Lastly, the valuation should accommodate the transitional nature of rate regulation. Rate regulation involves not only the transfer of cable assets from deregulation into regulation, but anticipates the subsequent transfer out of cable regulation into market competition. Both FCC and FERC precedent recognize the need to adopt transitional provisions to comport with fundamental equities. The Commission should accept into rate base both tangible and intangible assets shown on the books of cable operators, plus an adjustment in properties held by original owners for startup losses and prior earnings deficiencies.

3. Deferred Startup Losses Should Be Reflected Due to Transition

In the NPRM, the Commission requested comment "on the appropriate treatment of accumulated losses." NPRM at 22 n.44. The Commission then asked whether losses should be amortized over some future period and whether a return should be permitted on

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50/ As set forth in Exhibit C, in the years 1984-1991, more than 5,000 systems have been sold, including 58 MSOs, covering 40 million subscribers. Each year $5-7 billion in sales were reported until the economic downturn of 1990.

such unrecovered amounts until they are fully recovered. Id. The Commission should allow amortization of losses over a 10-year period with all unrecovered amounts receiving a fair return by their inclusion in the rate base.[51/]

Cable systems have characteristic growth cycles which must be accounted for in establishing rate base. Cable systems also are exceptionally capital intensive. They are built out to pass most homes in a community, and are typically engineered to pass sufficient signal to two televisions in each home. Yet adding subscribers to a new system is often a painstakingly slow process. To gain subscribers, a firm must conduct major marketing campaigns to attract and retain a loyal base of subscribers. Quick increases in subscribership is possible with deep discounts or similar giveaways, but that does not translate into a loyal, viable subscriber base. During the start-up years, subscriber churn is high while revenues are insufficient to cover operating expenses or return. The value of a viable subscriber base built in this manner contributes substantially to goodwill and to the value of the firm as a going concern.

Losses also typically result in the short term after purchase of a cable system due to amortization of premiums paid above book value for the business (expected future revenues) and

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51/ AUS Report at 20-25.

due to significant debt obligations. The expectation of the cable operator when evaluating and acquiring an existing system is that short term losses will turn around when cost savings and market penetration increase in the future and as debt is paid down. This is no different from the purchase of any other business which must undergo a maturation period before realizing a profit.

Past losses of traditional public utilities normally cannot be used to strike down a reasonable or otherwise compensatory rate,[52/] or capitalized as property upon which a fair return is based.[53/] However, in the unique circumstances of this proceeding, cable operators should be permitted to recover, and receive a fair return on, such accumulated losses reasonably incurred in the business during this transitional period. Moreover, where the losses are more properly characterized as necessary deferred start-up costs incurred in the establishment of a business, those costs should be recoverable in the rate base. Indeed, the failure to capitalize these amounts virtually guarantees that investors who bore the initial losses (either themselves or by virtue of a higher acquisition price) will never be compensated.

52/ Los Angeles Gas & Elec. Corp. v. Railroad Commission, 289 U.S. 287, 313 (1933); Galveston Elec. Co. v. City of Galveston, 258 U.S. 388, 395 (1921).

53/ Georgia Railway & Power Co. v. Railroad Comm'n of Georgia, 262 U.S. 625, 632 (1922).

It has long been recognized that the rate base encompasses much more than the physical assets comprising the regulated company's business. "The thing devoted by the [regulated company] investor to the public use is not specific property, tangible and intangible, but capital embarked in the enterprise. Upon the capital so invested, the Federal Constitution guarantees to the utility the opportunity to earn a fair return." Missouri ex rel Southwestern Bell Tel. Co. v. Public Serv. Comm'n, 262 U.S. 277, 290 (1922) (Brandeis, J. concurring). The D.C. Circuit has affirmed Justice Brandeis' "central idea that the investor's legally protected interest resides in the capital he invests in the utility rather than the items of property which the capital purchases for provision of utility service [has prevailed]." Democratic Cent. Comm. v. Washington Metropolitan Area Transit Co., 485 F.2d 786, 801 (D.C. Cir. 1973), cert. denied, 415 U.S. 935 (1974).

Because cable operators' investment in their businesses extends far beyond physical plant and property investment, and because the unrecovered accumulated costs represent a part of such capital investment, they should be included in cable operators' cost of service rates, with a portion allocated as part of cable operators' amortized expenses, and the remainder included as part of the rate base.

Because past uncompensated costs incurred in the start-up and developmental stages is "capital embarked on the enterprise", Southwestern Bell, 262 U.S. at 290, cable operators should be permitted return of those expenses through amortization, and return on any unamortized portion by including them in the rate base, at least until the expiration of a 10-year transitional period. These start-up expenditures, and other costs associated with operations, also referred to as the "going concern value", have been defined in the traditional public utility context as the difference in value existing between a plant in successful operation and a similar plant assembled but not yet functioning.[54/] Cable operators should be permitted a return on the going concern value of their businesses. Indeed, the Commission has explicitly permitted a rate-regulated communications carrier to include its deferred start-up costs, a significant portion of the going concern value, in its rate base.[55/]

In recognition of this generally severe but temporary financial hardship, regulators may allow construction work in progress (CWIP) in rate base to provide the utility needed cash to support its construction obligations while the plant is being built.[56/]

54/ See Willcox v. Consolidated Gas Co., 212 U.S. 19 (1909).

55/ Communications Satellite Corp., 56 F.C.C.2d 1101, 1184 (1975), remanded on other grounds, Communications Satellite Corp. v. F.C.C., 611 F.2d 883 (D.C. Cir. 1977).

56/ See Illinois Bell, 911 F.2d at 781-82.

In other cases, where cash recovery through rates is not provided, utilities are allowed to accrue as income an amount equal to the debt and equity cost of financing construction of that new plant as it is built. This factor is known as Allowance for Funds Used During Construction ("AFUDC")).[57/] Without such accounting, the utility's income would be drastically affected during construction. After the plant is operational, the plant costs, including interest accrued as AFUDC, are included in rate base and recovered through depreciation in rates. In many cases, if construction of the plant consumes many years, the amount of AFUDC will be quite significant.

Treatment of deferred cost recovery in the electric utility industry is not unlike that which may be granted the cable industry as it undergoes a transition to a regulated environment. Losses have occurred and are being incurred today in expectation of future revenues, just as losses would have occurred in the electric industry absent AFUDC. As the FCC suggests, those losses should be recognized and capitalized for recovery much like the AFUDC treatment granted electric utilities.

In the circumstances the cable television industry currently encounters -- top-to-bottom federally-mandated regulation

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57/ Id.

-- it is essential that the Commission allow cable operators the ability to capitalize and amortize accumulated losses, including all uncompensated start-up costs, and interest thereon. As the Commission suggested in the NPRM, cable operators should be permitted to expense unrecovered costs incurred in the development of its business and operations, and should be permitted to include the unamortized portion of unrecovered amounts until such amounts are fully recovered. This may be accomplished in part by allowing previous losses incurred during the unregulated period to be capitalized and amortized over some future period with the unrecovered balance in rate base.

The Commission should consider recording as a regulatory asset the cumulative balance of all losses incurred since construction of the system and recovery of the amount in rate base with return on the unamortized balance. This serves as a means to balance interests between shareholders and customers as customers will continue to benefit from the improved and expanded services which cable operators intend to provide. Capitalizing losses incurred in order to improve and expand services, at least in part, will give operators the means to accomplish such expansion and provide cable operators an opportunity to attract capital as the transition to a regulated environment occurs.

In sum, most cable systems have expensed these early costs resulting in these losses. But for ratebase purposes, they

must be added back to ratebase or they never will be recovered. This approach is consistent with the treatment given Comsat by the FCC and with the traditional treatment of capitalized interest on utility work in progress.[58/]

4. Previous Earnings Deficiencies Should Be Reflected in Ratebase

The general rule against capitalizing previous earnings deficiencies should be revised in developing the cable rate base. Cable operators who have foregone prior earnings and deferred dividends, and debt repayment should not now be penalized because their systems are subject to rate regulation. The Democratic Central Committee decision (which the Commission has endorsed in its Joint Cost Allocation Order) requires regulators to make an equitable allocation of gains and losses attributable to assets transferred into, or out of, regulation. In the circumstances of this proceeding, that means that the initial losses and earnings deficiencies experienced by unregulated cable operators, in the

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58/ Communications Satellite Corp. v. F.C.C., 611 F.2d 803, 890 (D.C. Cir. 1977). Should the Commission determine that deferred start-up costs or accumulated losses be neither expensed, nor included in the rate base, cable operators should be compensated for their risk, and have its transition eased by reflecting the increased risk through an adjustment to the authorized rate of return. All investments made at start-up, and otherwise calculated to bring operations and services to its current levels were performed with the reasonable expectation that these costs would be recovered at some future time. The Commission should allow cable operators to recover and receive a return on those expenses.

reasonable expectation that those deficiencies would be made up in the future, must be reflected in establishing the initial regulated accounts of the cable operators.

In this regard, in determining the initial rate bases applied to a cable system transitioning into rate regulation, it is appropriate to include, as a capitalized amount, earnings deficiencies (and not just losses) from prior years. For systems that have not changed hands, the reason that the existing owner tolerated lower earnings in earlier years based on a reasonable expectation of higher rates in later years, is that their operations would lead to a reasonable return on the investment in the system over the longer period. For systems that have changed hands, losses prior to purchase must be viewed as included in the purchase price (as an "intangible"), so the only additions to capital due to unreasonably low earnings are those that have occurred since the purchase. Indeed, we are not arguing that the general rules should be "revised" or "changed" in setting cable rates. Instead, the general rule simply does not come into play in the context of determining initial rate base for an industry just moving into regulation. Once regulation is established, the rule will apply, unless the Commission imposes an artificial limit (such as the non-cost based benchmarks) on cost-justified rate increases.

Many of the "intangibles" in the books of cable firms are used to reflect these business factors. For example, an operating cable system has detailed records of the subscription patterns of particular neighborhoods, and even of the interest by individual subscribers in premium channels and pay-per-view events. As another example, many cable operators have established extensive employee training procedures, implemented preventive maintenance, participated in "cable in the classroom" and other projects benefiting the community and subscribers. These intangibles transform spools of fiber and coax and purchase orders from equipment suppliers into a dynamic and innovative entertainment and information company.

There is no evidence that Congress sought to exclude the value of intangibles in valuing cable firms and indeed confirmed the reasonable investor's expectation that his investment in the cable system would include these intangibles. Indeed Congress in the one instance in which it expressed its understanding of the value of cable television systems, demanded that, unless a franchise is revoked for cause, cable television systems be valued at "fair market value, determined on the basis of the cable system valued as a going concern...". 47 U.S.C. § 627. This section was not amended by the 1992 Cable Act.

Moreover, if the Commission disallows expenses actually incurred, or otherwise prevents the recovery of, or return on,

various intangibles, the Commission's action would retroactively deprive cable operators of the benefits of investments made in years prior to regulation. This would violate the Takings Clause of the Fifth Amendment.

The Takings Clause of the Fifth Amendment forbids the government from taking property from public use without paying just compensation to the owner. Nixon v. United States, 978 F.2d 1269, 1275 (D.C. Cir. 1992). Retroactive application of the Cable Act so as to prevent the recovery of or return on various investments made by regulated cable operators in the years prior to regulation would constitute a per se taking of that property without just compensation because it would destroy the cable operators' rights in that property.[59/] In this situation, retroactive application so as to prevent or preclude recovery of various items of capital committed to the cable operation enterprise would deprive Plaintiff of its property in violation of the Fifth Amendment of the Constitution.[60/] Moreover, the Supreme Court has held that a statutory grant of legislative authority, such as the 1992 Cable Act, is not generally "understood to encompass the

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59/ There is no question that items accounted for as "intangibles" constitute protected property interests. Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1316 (9th Cir. 1989); Marrero v. City of Hialeah, 625 F.2d 499, 514-15 (5th Cir. 1980), cert. denied, 450 U.S. 913 (1981).

60/ See, e.g., In re Walkers Mill Inn, Inc., 117 B.R. 197, 199-200 (Bankr. W.D. Pa. 1990); Campbell v. United States, 809 F.2d 563, 571 (9th Cir. 1987).

power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." Bowen v. Georgetown Hospital, 488 U.S. 204, 208 (1988). Here, Congress clearly did not authorize retroactive application of the 1992 Cable Act.[61/] As a result, any Commission policy that amounts to a regulatory "disallowance" of investments in transactions undertaken before the advent of rate regulation would be outside the statute and unconstitutional.

F. Joint Commenters' Proposed Methods for Valuing the Ratebase

Based on the above discussion, an appropriate ratebase valuation methodology must recognize the value of intangible assets and allow the cable operator to separately identify and value these assets. This opportunity is necessary to assume the proper inclusion of all cable operators' invested capital in the deployment, operation and expansion of cable systems.

61/ If in fact the Act had retroactive application, the FCC would have rolled back rates to some much earlier level in order to "squeeze out" alleged monopoly profits. Instead, the FCC froze rates at the level that existed immediately before the Act was passed. Without the ability to retroactively roll back rates, the Commission would not have the power under the Act to retroactively disallow actual acquisition costs.

G. The NPRM's Proposed Ratebase Valuation Methodologies

1. Original Cost

If by "original cost" the Commission means only the cost of tangible property by the original owner of a system, plus capital additions made by subsequent owners, then the proposal is fundamentally inappropriate. In most instances, the "original" cost is lost in records which have either never been acquired or have been purged with time. Under APB-16 guidelines, "original" cost documents have most likely disappeared and could not be replicated with any accuracy.[62/] Moreover, this would overlook the fundamental value of intangibles which, for ratebase purposes is an element of value "upon which the owner has a right to make a fair return when the same is privately owned although dedicated to public use." McCardle v. Indianapolis Water Co., 272 U.S. at 414.

2. Replacement Cost

Replacement cost valuation does not reflect the actual expenditures of an owner in developing the plant to date, even if the system is held by the original owner. Most cable systems have been developed over several technological generations. Most cable systems were initially built to 12 channels, the

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62/ See Section III(E)(2), supra.